SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

KATHLEEN SPIEGELMAN,

Plaintiff,

v.

YELP, INC.,

Defendants.

LASC Case No: 18STCV05378

COURT'S FINAL RULING AND ORDER RE: DEFENDANT'S ANTI-SLAPP MOTION

Hearing Date: December 10, 2019

I. BACKGROUND

On November 16, 2018, Plaintiffs Kathleen Spiegelman, Gary Gagossian, and Dudley Danoff, MD, (collectively, "Plaintiffs") filed this action against Defendant Yelp, Inc. Plaintiffs' operative First Amended Complaint alleges that Defendant unlawfully used the names, photographs, and likenesses of Plaintiffs, thereby violating their California constitutional rights of privacy, California common law rights to one's name and likeness, California Civil Code § 3344, and California Business and Professions Code §17200 (UCL). Defendant specially moves to strike all four causes of action pursuant to Code of Civil Procedure section 425.16.

The Court heard argument and took the matter under submission.

II. DISCUSSION

A. Legal Standard.

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Civ. Proc. Code § 425.16(b)(1). Protected activity includes: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." *Id.* at § 425.16(e); *see Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 66 (2002).

Thus, the Court undertakes a two-step analysis: First, the Court must determine "whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity." *City of Cotati v. Cashman*, 29 Cal. 4th 69, 76 (2002). If such a showing has been made, the Court must then "consider whether the plaintiff has demonstrated a probability of prevailing on the claim." *Id.* When ruling on a special motion to strike, the Court must "consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." Civ. Proc. Code § 425.16(b)(2).

B. Plaintiffs' Causes of Action Arise from Yelp's Protected Activity.

"[T]he arising from requirement is not always easily met." *Equilon Enterprises*, 29 Cal.

4th at 66. "In short, the statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech." *City of Cotati*, 29 Cal. 4th at 78. "In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." *Id.*

Defendant contends that its posting of some of Plaintiffs' business information on its website constitutes "writing made in a place open to the public or a public forum in connection with an issue of public interest," Civ. Proc. Code § 425.16(e)(3). First, statements and information posted on Defendant's website "are accessible to anyone who chooses to visit . . . [and] hardly could be more public." *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 895 (2004); *accord Barrett v. Rosenthal*, 40 Cal. 4th 33, 41, fn. 4 (2006). Thus, the public forum requirement is indisputably established.

"Of course, not all statements made in a public forum, and not all conduct in furtherance of the rights of petition or free speech, fall under section 425.16, subdivision (e)(3) . . . ." *Wilbanks*, 121 Cal. App. 4th at 898. Rather, only those statement made "in connection with an issue of public interest," Civ. Proc. Code § 425.16(e)(3), are protected. "The most commonly articulated definitions of "statements made in connection with a public issue" focus on whether (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; and (3) whether the statement or activity precipitating the claim involved a topic of widespread public interest." 121 Cal. App. 4th at 898. "As to the latter, it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate." *Id.*

Here, the pleadings and evidence indicate that the statements and activity Plaintiffs seek to

hold Defendant liable for is the hosting of webpages for Plaintiffs' businesses (despite their protestations), *see, e.g.*, First Amended Compl. ¶ 13; MacBean Decl. ¶ 21, and posting of certain information, including basic business information and photos provided by third parties, *see* MacBean Decl. ¶¶ 4-12, 14. Accordingly, the gravamen of Plaintiffs' claims revolves around—and arises from—Defendant's decision to create and host pages for Plaintiffs' businesses without their consent. *See* First Amended Compl. ¶¶ 46, 59, 67. Thus, Defendant's activity can be fairly characterized as creating a forum and platform for members of the public to discuss Plaintiffs' businesses and compare alternatives in a meaningful manner. MacBean Decl. ¶ 4-12. While Defendant offers no dispositive, controlling case on this issue, its cited caselaw is nonetheless illuminating.

First, Defendant cites to *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 888-89 (2004). In that case, the Court of Appeal held that a defendant's statements about the plaintiff-brokers' purportedly unethical business practices constituted consumer protection information that was "directly connected to an issue of public concern." *Id.* at 900. Although not the direct target of Plaintiffs' claims, Defendants' activity here boils down to the creation of a forum for hosting consumer reviews of Plaintiffs' (and other) businesses, MacBean Decl. ¶ 5. These reviews indisputably contribute to the public debate and help consumers make informed decisions about where they should spend their money. Thus, while some of the content on Defendant's hosted pages consists of unprotected business information (e.g. address, business name, phone number) and photos, much of Defendant's activity relates to issues of public concern.

Moreover, while Defendant's decision to create the pages and broadcast them to a large audience is not alone sufficient to satisfy the public interest requirement, since "a publication does not become connected with an issue in the public interest simply because it is widely disseminated," *Wilbanks*, 121 Cal. App. 4th at 900, Plaintiffs' decisions to participate in the free

market under organized corporate forms and advertise themselves in various media, *see* First Amended Compl. ¶ 44, 57, 66, supports the conclusion that Defendant's activity relates to a public issue. Ultimately, it is this protected activity that Plaintiffs' claims arise from (i.e. they constitute the allegedly improper use of Plaintiffs' likenesses—an essential element of Plaintiffs' claims).

In their opposition and at oral argument, Plaintiffs contentiously disputed the applicability of *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664 (2010), and the Court's tentative conclusion that Defendant's speech cannot be considered unprotected commercial speech because protected content is not "deemed transformed into commercial speech merely because of its proximity to advertisements touching on the same subject matter." *Id.* at 687. In chief, Plaintiffs argue that this case is distinguishable because: (1) Defendant advertises competitors in the same industry; and (2) Defendant makes statements on Plaintiffs' pages (e.g. listing "Recommended Reviews," etc.). *See, e.g.*, Yacoubian Decl. ¶ 9, Ex. C, 44:7-25. Neither point is persuasive.

First, it does not matter that Defendant advertises competitors and related businesses. A topical nexus with an advertisement alone is insufficient to constitute a use of someone's image. *See Stewart*, 181 Cal. App. 4th at 686-87 ("In fact, the only nexus between the ad and the Feature is the mutual references to independent music."). Rather, the relevant inquiry in determining whether the speech (i.e. the particular Yelp pages and their alleged use of Plaintiffs' likenesses in connection with advertisements) constitutes unprotected commercial speech revolves around whether Plaintiffs' likenesses are incorporated *in* the advertisements. *See id.* at 687 ("This distinguishes the present case from [*Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1000 (9th Cir. 2001)], wherein the photograph of the surfers was explicitly used to market replicas of the same T-shirts that the surfers were wearing."). Here, the record is clear that "[n]one of the [Plaintiffs' likenesses] appear in the [advertisements for their competitors]," *id.*

Second, none of the "statements" (i.e. the uniform text consistent across Yelp pages that

identifies the pages' different sections, such as reviews, advertisements, etc.) posted by Defendant that are at issue in *this* lawsuit are sufficient to bring their conduct within the ambit of commercial speech and Code of Civil Procedure section 425.17(c).[1] It is on this point that Plaintiffs' use of *Demetriades v. Yelp, Inc.*, 228 Cal. App. 4th 294 (2014), is unpersuasive. In that case, the Court of Appeal held that Yelp's complained of activity fell within Code of Civil Procedure section 425.17(c) because "Yelp's statements about its review filter—as opposed to the content of the reviews themselves—are commercial speech about the quality of its product (the reliability of its review filter) intended to reach third parties to induce them to engage in a commercial transaction (patronizing Yelp's Web site, which patronage induces businesses on Yelp to purchase advertising)." *Id.* at 310. Here, however, Yelp has made no representations about itself, its products, or its services. Any text Yelp "created" on Plaintiffs' pages consists solely of barebones descriptors and headings designed to direct the users of its website. None of the language Plaintiffs point to consists of any affirmative representation that confers a commercial benefit on Yelp. Thus, *Demetriades* does not help Plaintiffs here.

Therefore, the Court finds that Plaintiffs' claims arise from Defendant's protected activity. Accordingly, Plaintiffs must show that an exception applies or demonstrate a probability of success on the merits to survive Defendant's motion.

C. No Exception Applies.

Plaintiffs' contend that the public interest exception applies here. Code of Civil Procedure section 425.17(b) provides that "any action brought solely in the public interest or on behalf of the general public . . ." is not subject to a special motion to strike, provided certain criteria are met.

[1] Plaintiffs' appear to characterize their claims as ones arising from the allegedly unfair business practice of Yelp offering Plaintiffs the opportunity to "buy out" advertising space on their business's pages that they did not consent to the creation of, but the operative complaint cannot be read—in any manner whatsoever—as advancing such a claim. Thus, this unpleaded claim—and the other claims Plaintiffs' contend they would seek leave to add to their complaint—cannot save them here. Rather, the Court must analyze Plaintiffs' complaint as it stands.

Accord Blanchard v. DIRECTV, Inc., 123 Cal. App. 4th 903, 913-14 (2004). To be exempt: (1) the plaintiff must "not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member," Civ. Proc. Code § 425.17(b)(1), not including any "claim for attorney's fees, costs, or penalties . . . ," *id.*; (2) "[t]he action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons," *id.* at § 425.17(b)(2); and (3) "[p]rivate enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter." *Id.* at § 425.17(b)(3)

In *Blanchard v. DIRECTV, Inc.*, 123 Cal. App. 4th 903 (2004), the Court of Appeal held that a putative UCL class action comprised of individuals who owned devices capable of pirating DIRECTV satellite streams and received demand letters from DIRECTV did not meet the requirements of Code of Civil Procedures section 425.17(b)(2)-(3). With respect to the second element, the Court of Appeal held that plaintiffs there would not be enforcing an important public right because "plaintiffs want to enjoin DIRECTV from sending this particular demand letter concerning this specific electronic device to users of this device." *Id.* at 914-15. The Court noted that plaintiffs were "not seeking to assert some general right not to receive demand letters or notices[, n]or d[id] they seek a declaration about demand letters in general." *Id.* at 915. Thus, the Court of Appeal concluded that "[n]otwithstanding the number of the recipients of the letters rank in the thousands, there is no public interest principle being vindicated by this action." *Id.*

With respect to "the third element, the so-called necessity and financial burden factor," *id.*, the Court of Appeal held that plaintiffs failed to meet that element because their "UCL claim [wa]s entirely personal to them." *Id.* at 916. The Court of Appeal observed that plaintiffs sought "an accounting to them and restitution to them of moneys they paid to DIRECTV." *Id.*

Here, without analyzing the first two elements, the Court finds that Plaintiffs fail the third.

Plaintiffs and the class they seek to represent consist only of business owners with the requisite fame and notoriety to have their names and likenesses meaningfully appropriated—a narrow group that could hardly be considered representative of the general public. Plaintiffs and the class seek the greater of their actual damages or statutory damages of $750 per misappropriation, as well as punitive damages and injunctive relief limiting Defendant's ability to publish and host content, in their prayer for relief. *See* First Amended Compl.; Civ. Code § 3344(a). Thus, the general public, aside from receiving little to no pecuniary benefit from this litigation, would potentially be harmed by the injunctive relief Plaintiffs seek since the public forum that Defendant provides to the public would be substantially limited. Accordingly, the Court finds that "the benefits that would be conferred on [P]laintiffs, if they were victorious in this lawsuit, far transcend any conceivable benefit to the general public." *Blanchard*, 123 Cal. App. 4th at 916.

Therefore, the public interest exception in Code of Civil Procedure section 425.17(b) does not apply to Plaintiffs' claims here.

D. Plaintiffs Have Demonstrated a Probability of Success on the Merits.

Because Defendant has shown that all four of Plaintiffs' causes of action arise from protected activity, Plaintiff has the burden of establishing a probability of success on the merits with respect to those claims. *Cotati*, 29 Cal.4th at 76. Plaintiffs cannot do so here.

Plaintiffs' first three causes of action are for statutory, common law, and derivative UCL claims for alleged violations of the right of publicity. These claims generally have "four elements: (1) defendant's use of plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 208 (2017); *see* Civ. Code § 3344.

Here, Plaintiffs have not demonstrated that Defendant used their identities for commercial, advertising, or sales purposes. The Court finds *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190

(2017), to be dispositive on this point. There, the Court of Appeal held that allowing "unrelated third party advertisements to run adjacent to pages containing users' comments about [plaintiffs] and [their] business practices . . . [wa]s insufficient," *id.* at 211, to constitute misappropriation of name or likeness. Here, while ads for similar businesses were displayed on—and next to—Plaintiffs' Yelp pages, Plaintiffs' names and likeness do not appear "in the ads themselves," *id.* at 209. Thus, Plaintiffs' right of publicity claims necessarily fail.

Plaintiffs' also fail to demonstrate a probability of success on the merits with respect to their fourth cause of action for violation of their rights to privacy. As Defendant notes, Plaintiffs cannot have an expectation of privacy in the registered names of their businesses, which are matters of public record. *See Gates v. Discovery Communications, Inc.*, 34 Cal. 4th 679, 696 (2004). Nor can Plaintiffs have privacy interests in photos and information that *they* posted to Defendant's publicly accessible website. *See Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App. 4th 1125, 1130-31 (2009).

III. CONCLUSION

For the foregoing reasons, Defendant's special motion to strike under Code of Civil Procedure section 425.16 is **GRANTED**.

Dated: February 5, 2020

Daniel J. Buckley
Judge of the Superior Court